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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 18.

PETER ALFONS BINDCZYCK, *Petitioner,*

vs.

THOMAS G. FINUCANE, individually and as Chairman of the Board of Immigration Appeals, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PETITIONER.

JOSEPH A. FANELLI,
ISIDORE ENGLANDER,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The judgment of the District Court (R. 20-21) was issued without opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 23ff.) is reported at 184 F. (2d) 225.

JURISDICTION.

The judgment of the Court of Appeals (R. 33) was entered on June 19, 1950. A petition for rehearing timely filed (R. 34) was first denied by order of the Court of Appeals entered on September 28, 1950 (R. 45). On November 21, 1950, the Court of Appeals on its own motion vacated its order of September 28, 1950, denying the petition for rehearing (R. 47). The petition for rehearing thus left pending for consideration by the Court of Appeals was denied by order of that Court entered on December 21, 1950 (R. 48). The petition for a writ of certiorari was filed on March 15, 1951, and granted on April 30, 1951 (R. 36). The jurisdiction of this Court rests upon the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. In Section 338 of the Nationality Act of 1940, Congress provides for the setting aside and revoking of citizenship under a detailed procedure therein laid down which provides safeguards for the citizen whose citizenship is attacked. The first and main question presented is whether Section 338 of the Nationality Act is exclusive and hence compulsory upon the Government for valid revocation of citizenship.

2. If the first and main question were answered in the negative, a second question would be presented: Whether the revocation of petitioner's citizenship obtained upon a motion filed, served, heard and decided upon the same day when petitioner was away from home, under military arrest and without counsel was void under the Constitution, Article I, Section 8, clause 4, and the Fifth and Fourteenth Amendments.

STATUTE INVOLVED.

Section 338 of the Nationality Act of 1940, 8 U. S. C. 738, 54 Stat. 1158, provides that:

> "(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.
>
> "(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be give by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

STATEMENT OF THE CASE.

The facts are not in dispute. As largely alleged in petitioner's complaint in the District Court, and admitted upon respondents' motion to dismiss, the pertinent facts may be simply summarized as follows:

Petitioner, Peter Bindczyck (pronounced as if spelled "Binchick"), became a citizen of the United States by naturalization in the Circuit Court of Frederick County, Maryland, on December 2, 1943, and his certificate of naturalization was duly issued by that court. (R. 3).

Petitioner has never lost his United States citizenship by expatriation or otherwise. And the order of the Cir-

cuit Court of Frederick County admitting petitioner to citizenship has never been revoked and set aside pursuant to the provisions of Section 338 of the Nationality Act of 1940. (R. 3).

In Section 338 of the Nationality Act of 1940, 8 U. S. C. Sec. 738, the Congress laid down a detailed procedure for proceedings to revoke and set aside an order admitting a person to citizenship and to cancel the certificate of naturalization issued. In paragraph (a) of that Section, the Congress specified *first*: who shall institute such proceedings—the United States District Attorney; *second*: what shall move the United States District Attorney to institute such proceedings—an affidavit showing good cause; *third*: what courts shall have jurisdiction to handle such proceedings—those courts which have jurisdiction to naturalize aliens; *fourth*: where such proceedings shall be brought—in the judicial district where the naturalized citizen resides at the time of bringing suit against him to revoke his citizenship; and *fifth*: the grounds upon which an order admitting to citizenship shall be revoked and the certificate of naturalization cancelled—two grounds specified, fraud and illegal procurement.

In a separate paragraph (b) of Section 338 Congress specified *sixth*: the extent and type of notice to the citizen whose naturalization is alleged to have been fraudulently or illegally procured—the citizen "shall . . . have sixty days' personal notice in which to make answer to the petition of the United States." And finally, the Congress specified, too, the mode and detail of service upon the citizen in the event of his absence from the judicial district of residence.

On December 9, 1943, a motion was filed in the proceeding in the Circuit Court of Frederick County, Maryland, in which petitioner had been naturalized (R. 5, 19). The motion was "to vacate and set aside the order of admission" of petitioner "to citizenship." The motion purported to be "on behalf of the United States Govern-

ment" (R. 19); but was in no sense the "institution of proceedings" by a "petition of the United States." See Section 338 of the Nationality Act of 1940. The motion was not signed and filed by the United States District Attorney for the judicial district in which Frederick County, Maryland, is located, as required by Section 338. So far as appears from the record, the United States District Attorney was never consulted, or if consulted, declined to file and prosecute any such motion. The motion was signed and filed by someone by the name of Cook, a "naturalization examiner of the Immigration and Naturalization Service, Washington, D. C." (R. 19-20). At the time of the filing of the motion, petitioner, a soldier in the United States armed forces, was under military arrest at Camp Ritchie, Maryland; but his residence was and is New York. (R. 3; 6; 12; 14). The motion apparently was accompanied by an affidavit executed by a corporal; but whether in accordance with Section 338 the affidavit would have shown "good cause" to a United States District Attorney had there been one is doubtful; for the affidavit (R. 11-12) in one short paragraph merely sets forth what petitioner was supposed to have said to two commissioned officers (who were available, R. 15), in conversations lasting over one hour and a half. The corporal did not indicate the source of such knowledge.

Section 338 requires sixty days' notice of proceedings to revoke and set aside an order of citizenship. The motion to revoke and set aside the order admitting petitioner to citizenship was served, filed, heard and decided on the same day, December 9, 1943. (R. 5; 13 ff.). The Circuit Court of Frederick County on that day entered an order vacating and setting aside the order which had admitted petitioner to citizenship and cancelling his certificate of naturalization. The ground of such action is stated in neither the motion (R. 13; 19-20), nor the court's order (R. 20); although, admittedly, the general atmosphere of the proceedings (R. 11-20) would indicate

that what Cook had in mind was something in the nature of fraud.

The motion and order thereon vacating and setting aside petitioner's citizenship did not comply with Section 338. (R. 5-6). The respondents concede the non-compliance (R. 6). Nevertheless, as the officials of the Government concerned with the deportation of aliens, they rely on the order which ignored Section 338, and insist on deporting petitioner as an alien (R. 4-5; 6).

Such deportation and denial of petitioner's citizenship would deprive him of the following rights and privileges of a citizen and national of the United States: (1) the right to live in the United States, his home ever since 1938; (2) the right to pursue happiness in the midst of his family, consisting of his wife, child, and close blood relatives of his wife; and since they are all native-born American citizens to remain with them in the United States; (3) the right to support his wife and child in the United States by pursuing his lawful occupation of tool worker and designer; (4) the privilege of voting in United States elections; and (5) the right to be free of the application to him of statutes, rules and procedures which pertain solely to aliens. (R. 4).

Hence, petitioner began this proceeding in the District Court by suit against respondents, all agency heads in the Department of Justice concerned with deportation of aliens.[1] The suit sought a judgment declaring petitioner to be a citizen national of the United States. Such suit is expressly authorized by Section 503 of the Nationality Act of 1940, 8 U. S. C. 903.

The District Court was of the view that Section 338 of the Nationality Act of 1940 is exclusive in providing the only method for setting aside and revoking citizenship. Hence, the District Court granted petitioner summary judgment declaring him to be a national and citizen

[1] The agency heads originally included Mr. Justice Clark, who was then Attorney General. Respondent J. Howard McGrath has since been substituted for Mr. Justice Clark.

of the United States (R. 20-21). Such judgment was expressly stated to be "without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940" (R. 21).

Our defense to the assertion of fraud in petitioner's naturalization still awaits the institution of Section 338 proceedings which provide the opportunity for the taking of counsel and the preparation of a defense. It is an odd kind of fraud that can be attempted to be proven only with the elimination of all opportunity to be at liberty, to take counsel, to know one's rights, to know the consequences of action or non-action, to prepare a defense, to have the time to recover from serious mental and emotional disturbance and to think true and act calmly. But the respondents appealed from the order of the District Court.

The Court of Appeals reversed with instructions to the District Court to dismiss petitioner's complaint (R. 33).

The Court of Appeals was of the following view: If Cook, the naturalization examiner, had "purported to have acted pursuant to the provisions of [Section 338]" the Court would not have hesitated to affirm the District Court judgment in petitioner's favor, for, as the Court observed "the authorities are abundantly clear in denying the allowance of the order vacating and setting aside a naturalization where the strict letter of section 338 as laid down by Congress is not followed" (R. 25). However Cook did not "purport" to follow Section 338, and hence, the Court below said, that Section did not preclude the setting aside of petitioner's naturalization on a motion filed within the same term as the naturalization (R. 26; 32). The Court disposed of the serious, constitutional question resulting from its view by stating that petitioner waived his constitutional rights, apparently in the argument of his counsel before that Court (R. 24).

A petition to rehear (R. 35-43) attacked substantial errors (in our view) in the Court's decision; insisted that

the record does not show that the setting aside of petitioner's naturalization was in the same term as his naturalization; and denied any waiver of the constitutional question. The petition to rehear was denied without opinion (R. 45; 48).

In requesting a writ of certiorari, petitioner presented both the statutory and the constitutional questions concerning the invalidity of the revocation of his citizenship. The Court granted certiorari without limitation (R. 36).

SPECIFICATION OF ERRORS TO BE URGED.

We urge that the court below erred:

1. In failing to hold that the revocation of petitioner's citizenship was invalid for lack of compliance with Section 338 of the Nationality Act of 1940.

2. After making the first error urged, in failing to pass upon the constitutional questions involved to hold the revocation of petitioner's citizenship invalid under the Constitution, Section 8, clause 4, and the Fifth and Fourteenth Amendments.

3. In holding that citizenship may, without compliance with Section 338, be revoked in the same term of court as the grant of citizenship revoked.

4. After making the third error urged, in holding the revocation of petitioner's citizenship valid as made within the same court term as the grant of his citizenship, although the necessary fact of same term is assumed and not proven in the record.

5. In failing to affirm the judgment of the District Court declaring petitioner to be a citizen of the United States.

SUMMARY OF ARGUMENT.

Congress in Section 338 of the Nationality Act provided a code of procedure for the cancelling of naturalization. The "cancelling" of petitioner's naturalization, relied upon by respondents, completely ignored the provisions of Section 338 and was therefore void. Section 338 is obligatory for valid cancellation. It is so held in all circuits in which the question has arisen—those being the Seventh, Third, Second, Fifth and Tenth Circuits. Beyond that, it is well-settled that in naturalization matters, whether in the granting or cancelling of naturalization, the statutory procedures provided by Congress are obligatory.

The foregoing judicial precedents but enforce the intent of Congress, plain on face of statute and in legislative history, to make its naturalization provisions in general, and Section 338 in particular, exclusive in order to secure uniformity.

If there be doubt of this, a constitutional question as to uniformity would require construction of Section 338 as exclusive.

Apart from Section 338, the cancelling of petitioner's naturalization was void for want of due process. He did not get reasonable notice and opportunity to be heard.

ARGUMENT.

A. The Revocation of Petitioner's Citizenship Was Invalid for Want of Compliance With Section 338 of the Nationality Act of 1940.

There is no question that the Circuit Court of Frederick County, in its order revoking and setting aside petitioner's citizenship and cancelling his certificate, covered precisely the ground covered by Section 338 of the Nationality Act, albeit without observing the procedural safeguards required by that Section. Was it the intent of Congress in passing Section 338 to require that its

provisions be observed in all cases of revoking and setting aside of citizenship—that is the basic question here.[2]

1. *The intent of Congress to make Section 338 compulsory upon the government is reasonably plain upon the face of that section when considered in the light of common sense.*—That Congress provided in Section 338 for the institution of revocation proceedings by the appropriate United States Attorney, and nevertheless intended for such power to exist in a naturalization examiner is not likely. And that improbability becomes even less likely in the light of a significant circumstance. Section 338 is a reenactment of Section 15 of the Naturalization Act of 1906, 8 U. S. C. (1934 ed.) 405, 34 Stat. 601. Section 338 differs from its predecessor, Section 15 of the 1906 Naturalization Act, in but one material respect. Section 15 provided for the institution of proceedings by the United States Attorney *or* the Commissioner of Naturalization *or* the Deputy Commissioner of Naturalization. In enacting Section 338, the Congress deliberately eliminated the Commissioner and Deputy Commissioner

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[2] That the intent of Congress controls the question here is clear, at least to us. Congress has the constitutional power "to establish a uniform rule of naturalization", and, in that connection, exclusive power over all matters of naturalization—granting and revoking of citizenship, and the procedure therefor. The Constitution, Art I, Sec. 8, cl. 4; *Baumgartner* v. *U. S.*, 322 U. S. 665; *U. S.* v. *Ginsberg*, 243 U. S. 472. In the opinion of the Court below, R. 25, there is the suggestion that Congress may lack "the power" to bar the procedures by which petitioner's citizenship was set aside in the Circuit Court of Frederick County. The suggestion is plainly wrong. *Knauer* v. *U. S.*, 328 U. S. 654, 673; *Luria* v. *U. S.*, 231 U. S. 9; *Johannessen* v. *U. S.* 225 U. S. 227; *Grahl* v. *U. S.*, 261 Fed. 487 (CCA 7th, 1919); *U. S.* v. *Mansour*, 170 Fed. 671 (S. D. N. Y., 1908), aff'd 226 U. S. 604.

There are some doubts as to the constitutionality of Section 338. But they do not lie in the direction of questioning the power of Congress to bar the star-chamber type of proceeding used in purported cancellation of petitioner's citizenship. To the contrary, a minority of the Justices of the Supreme Court have believed Section 338 to be unconstitutional on two quite different grounds. They doubt the power of Congress to authorize cancellation of citizenship for the naturalized citizen when none is authorized for the native-born. The Constitution, they say, provides for but one class of citizen, equal in all the rights and liabilities of citizenship, except eligibility for the Presidency. Further, they doubt the sufficiency of the safeguards contained in Section 338 to insure the fair hearing required by due process. See *Knauer* v. *U. S.*, 328 U. S. 654, 676, 677, 678.

These constitutional difficulties should lead to the resolution of doubts in favor of petitioner if there be any serious question of the applicability of Section 338 to all proceedings for cancellation.

of Naturalization and confined the power of instituting proceedings to the United States Attorney. It is extremely unlikely that Congress saw fit to take such power away from the Commissioner and Deputy Commissioner but nevertheless intended to have such power in their subordinate naturalization examiners.

Nor is it likely that Congress in Section 338 provided for sixty days' personal notice to the citizen, thus safeguarding the opportunity for his defense, and yet intended that notice of less than a day could effect revocation of citizenship.

But in Section 338 and in its predecessor, Section 15 of the 1906 Act, Congress did not stop with specifying the public official charged with responsibility for revocation suits and the extent of notice to be given. Congress set forth, and defined and delimited, a complete procedure for revocation down to the very details of who shall bring suit for revocation; on what evidence of "good cause"; on what grounds; in what types of courts and where; by what kind and length of notice; and by what kind of service on the citizen. Surely, it is most unlikely that Congress spelled out all of these specifications for naught because it had an intention at the same time to permit citizenship to be revoked by a procedure opposed at practically every point to the provisions of Section 338.

In Section 338, the Congress achieved a nice, working balance between the protection of the Government against citizenship fraudulently or illegally procured and the safeguarding of the citizen against unfair or hurried loss of his citizenship. For the equitable balance so worked out by Congress, petitioner got the imbalance of a procedure worked out by a naturalization examiner and lacking even in the rudiments of due process (see Point B, *infra*). It is almost absurd to believe that such could have been the intention of Congress in working out the equitable balance enacted in Section 338.

Section 338 with its finely delimited procedures and nicely balanced protection of Government and citizen alike was enacted by Congress as part of the Nationality Act of 1940. Congress intended it to be part of "an act to revise and codify the nationality laws of the United States into a comprehensive nationality code" (such is the very title of the Nationality Act). To urge that Congress, nevertheless, did not intend the part of its "comprehensive code" which sets forth a code of procedure for cancellation of nationality, to be an exclusive "revision and codification", makes little sense.

It is possible that Congress in enacting Section 338 was idling away its time in providing procedures and safeguards to be observed only at the Government's convenience. And possibly Congress did not intend a "comprehensive code" to be "comprehensive", even though the Congress expressly stated its intention to have "a comprehensive code". However, the establishing of possibilities so unlikely in the expectations of common sense requires of respondents the support of persuasive judicial authorities and clear evidences of such legislative intent. *Cf.* Jackson, J., concurring in *U. S.* v. *Spelar*, 338 U. S. 217, 225: "While Congressional incoherence of thought or of speech is not unconstitutional, . . . we should pay Congress the respect of not assuming lightly that it indulges in inconsistencies of speech which make the English language almost meaningless".

There are persuasive judicial authorities and clear evidences of the legislative intent. But as one would, in common sense, expect, and as we urge, they all prove the intention of Congress to require compliance with its provisions in Section 338 for the cancelling of citizenship.

2. *The intent of Congress to make Section 338 compulsory upon the Government is shown by the legislative history of that section.*—The Naturalization Act of 1906, 8 U. S. C. (1934 ed.) Sec. 352 ff., is the predecessor of our present Nationality Act of 1940; and Section 15 of the

Act of 1906 is the almost identical forerunner of our Section 338 of the Nationality Act.[3] The legislative history of both statutes shows the intention of Congress to provide uniform and exclusive methods for the granting and cancelling of naturalization.

In passing the Act of 1906, the Congress was acutely aware of its exclusive power over all matters of naturalization and aware also that the constitutional condition on the exercise of that exclusive power is uniformity. The Constitution, Art. I, Sec. 8, cl. 4. Indeed, the Congress considered uniformity essential not only because of the constitutional limitation upon its power but also because of the abuses to be remedied by the proposed Act of 1906. The absence of statutory details to prescribe a uniform procedure on both the granting and cancelling side of naturalization had previously led to loose and sketchy procedures resulting in grave frauds.[4]

The abuses to be remedied in naturalization matters "resulted", said both the Senate and House Committees on the proposed Act of 1906, "more from lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such cases." And, hence, "in order to correct the abuses that have been disclosed it is imperative in the judgment of your committee, that a law should be enacted prescribing a fixed and uniform system and a code of procedure in naturalization matters." See Sen. Rep. 4373, pp. 1-2; House Rep. 1789, pp. 1-2; and House Rep. 5075; all on H. R. 15442 (the Act of 1906), 59th Congress, 1st Session.

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[3] We say "*almost* identical" because Congress in Section 338 saw fit to take away from the Commissioner and Deputy Commissioner of Naturalization the authority those officials formerly had under Section 15 of the Act of 1906 to institute proceedings for cancellation. See the discussion at p. 10, supra.

[4] For judicial descriptions of the loose procedures and frauds brought to the attention of Congress in its passage of the Act of 1906 see *U. S.* v. *Lenore.*, 207 Fed. 865, 867 (D. C. N. Dak., 1913); and *U. S.* v. *Kusche*, 56 F. Supp. 201, 220-221 (S. D. Cal., 1944).

Representative Bonynge, who was in charge of the proposed legislation on the floor of the House, explained the full intent and purport of the Act of 1906 thus:

> "It does provide for a general and a uniform system of naturalization to be enforced throughout the United States" (40 Cong. Rec. 3640.)

And, with specific reference to the cancellation provision of the proposed 1906 Act, which is now Section 338 of the Nationality Act, Representative Bonynge, House Manager of the proposed 1906 Act, explained:

> "It provides a procedure for the cancellation of certificates of naturalization that may be obtained through fraud of any kind. * * * The procedure can be put under one head as one feature of the bill. I think that is a very, very important feature; that we should exercise the authority given to us by the Constitution of the United States to establish—to use the exact language of the Constitution—'to establish a uniform rule of naturalization.' That this bill does; and I think it is very important." (40 Cong. Rec. 3651.)

See also to the same effect, the statement of Representative Hughes in support of the proposed legislation, 40 Cong. Rec. 7044; and *Luria* v. *United States*, 231 U. S. 9.

So the Act of 1906 was not intended to change policy in substantive matters but rather to "provide a fixed and uniform system and code of procedure in naturalization matters to be enforced throughout the United States." See Sen. Rep. 4373, pp. 1-2, *supra;* the Statement of Bonynge, House Manager on the Act of 1906, *supra*; *Tutun* v. *U. S.*, 270 U. S. 568, 579-580; and *Ozawa* v. *United States*, 260 U. S. 178, 190. And part of that fixed and uniform code of procedure to be enforced throughout the United States were the proceedings for cancellation set forth in Section 15. The Manager of the proposed 1906 Act took pains to point that out specifically (see his full

statement on the subject, *supra*); and see *U. S.* v. *Kusche*, 56 F. Supp. 201, 222 (S. D. Cal., 1944).

The Act of 1906 did provide such a system of fixed and uniform procedure to be enforced throughout the nation both in the granting and cancelling of citizenship. That is apparent from the provisions of the Act of 1906. In considerable detail, the Act prescribes the mode and manner of obtaining naturalization—the forms to be used; the oath to be administered; and the fees to be collected; and the mode and manner of cancelling naturalization—the type of proceeding; the officer empowered to prosecute; the courts empowered to cancel; the length and type of notice; and the method and type of service.

Yet the Executive and the Congress found that the Act of 1906 did not provide sufficient detail and was not comprehensive enough to secure uniformity in naturalization matters. Hence, the Nationality Act of 1940. The Nationality Act was drafted to meet the "need for an accurate, comprehensive, and detailed code by which naturalization is to be conferred and any abuse of the process remedied." *Statement of the Secretaries of State and Labor and the Attorney General (Cummings, Hull, and Perkins) in submitting the draft of the Nationality Act*, 86 Cong. Rec. 11945. And more explicitly with relation to revocation, the cabinet heads explained: "No alien has the slightest right to naturalization unless all statutory requirements are complied with, and every certificate of citizenship must be treated as granted on condition that the Government may challenge it in regular proceedings for the purpose and demand its revocation unless issued in accordance with statutory requirements. The proposed code, herewith, represents a studied effort to draft a measure which would conform to the constitutional requirement that the rule of naturalization be 'uniform'." id. The Congress pursued these objectives and, in passing the Nationality Act, "revised and codified the nationality laws of the United States into a comprehen-

sive nationality code" (Title of the Act), "containing in logical and systematic form a statement of all the laws of the United States" prescribing "the conditions under which citizenship of the United States may be acquired or lost." Sen. Rep. 2150, p. 2; House Rep. 3019, p. 3; House Rep. 2396, pp. 1-2; Statement of Rep. Rees, Chairman of the Committee on Immigration and Naturalization, 86 Cong. Rec. 11947; all on the proposed Nationality Act, H. R. 9980, 76th Cong., 3rd Sess.

The Nationality Act of 1940 in setting forth "all the laws of the United States prescribing the conditions under which citizenship of the United States may be acquired or lost" sets forth no law condoning the lack of safeguarding procedures by which petitioner's citizenship is asserted to have been lost. To the contrary, the only provision in the Nationality Act for cancellation of citizenship is Section 338. And in Section 338, as the Supreme Court has noted in sustaining the constitutionality of such a cancellation provision, jurisdiction to cancel is conferred only "under conditions affording to the party whose rights are brought into question full opportunity to be heard". *Johannessen* v. *U. S.*, 225 U. S., 227, 241.

All of the foregoing was once clear to the Government. Indeed, in the past, the Government was so impressed by the legislative evidences of the intent of Congress to make its cancellation provision exclusive that it urged such exclusivity against the validity of an appeal from a naturalization judgment. As Department of Justice counsel then stated: "The only method provided for attacking the findings of a court in naturalization is provided by [Section 15 of the Act of 1906], and then only on the part of the Government by suit to cancel on the grounds of fraud or illegality. This single method was supplied designedly by Congress . . ." See *State ex rel. Weisz* v. *District Court*, 61 Mont. 427, 431; 202 Pac. 387 (1921). But that was some decades ago when the intent

of Congress in passing Section 15 of the Act of 1906 was fresher in the minds of Government counsel.

This Court has not lost sight of the will evidenced by Congress to make its enactments on naturalization matters exclusive and compulsory. The Court has taught with specific reference to the naturalization statute that: "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." *U. S.* v. *Ginsberg*, 243 U. S. 472, 474.

3. *The intent of Congress to make Section 338 compulsory upon the government is confirmed by well-settled precedent.*—The question of the validity of a cancellation of citizenship obtained without strict observation of the requirements of Section 338 (or its predecessor provision, Section 15 of the Naturalization Act of 1906) has been before the federal courts in seven decisions. All seven decisions hold such cancellation void. *U. S.* v. *Sotis*, 131 F. (2d) 783 (C.C.A. 7th, 1942); *U. S. ex rel. Harrington* v. *Schlotfeldt*, 136 F. (2d) 935 (C.C.A. 7th, 1943); *U. S. ex rel. Volpe* v. *Jordan*, 161 F. (2d) 390 (C.C.A. 7th, 1947); *U. S.* v. *Stabler*, 169 F. (2d) 995 (C.C.A. 3rd, 1948); *U. S.* v. *Watkins*, 168 F. (2d) 883 (C.C.A. 2nd, 1948); *U. S.* v. *Kiriaze*, 172 F. (2d) 1000 (C.C.A. 5th, 1949); *U. S.* v. *Gronich*, 211 Fed. 548 (W. D. Wash., 1914); and see *U. S. ex rel. Lapides* v. *Watkins*, 165 F. (2d) 1017 (C.C.A. 2nd, 1948).[5]

[5] In the *Sotis*, *Jordan*, *Watkins*, and *Kiriaze* cases (cited in the text), cancellations of citizenship previously obtained by the Government were struck down for want of strict compliance with Section 338. The *Harrington* and *Stabler* decisions applied the same requirement of strict compliance with Section 338, and upheld the cancellations of citizenship there involved because strict compliance with Section 338 was found. In the *Gronich* case, a petition of the United States to cancel citizenship, which otherwise complied with Section 15 of the 1906 Act, was dismissed for failure to comply with the one statutory particular of residence.

The *Gronich* case was decided in 1914, only eight years after the enactment of Section 15 of the 1906 Act which first laid down the Congressional requirements now set forth in Section 338. Yet the Government made no argument then of jurisdiction in the court to cancel independently of the jurisdiction conferred by Section 15 of the 1906 Act.

The *Volpe* decision by the Seventh Circuit Court of Appeals held void a cancellation of citizenship which, like petitioner's cancellation, was obtained in complete disregard of Section 338. There cancellation was obtained upon a motion to cancel filed in the state naturalizing court within the same term as the naturalization. The *Volpe* decision is precise authority for our position.

But the *Sotis* and *Harrington* decisions of the Seventh Circuit Court of Appeals, the *Stabler* decision of the Third Circuit Court of Appeals, the *Watkins* decision of the Second Circuit Court of Appeals, the *Kiriaze* decision of the Fifth Circuit Court of Appeals, and the *Gronich* decision in the Tenth Circuit are *a fortiori* authorities here. For in those cases the Government, in obtaining or seeking cancellation, had generally complied with the requirements of Section 338 and the only question was the necessity for compliance with one particular detail of Section 338 omitted by the Government, or asserted by the defending citizen to have been omitted by the Government. Those decisions insisted on compliance with each detail of Section 338.[6] Here the Government purported to cancel petitioner's citizenship in complete disregard of Section 338.[7]

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[6] The *Stabler*, *Watkins*, *Harrington* and *Gronich* cases were concerned with failure of various kinds to follow the requirements of Section 338 as to the district in which cancellation suits may be brought. The *Sotis* and *Kiriaze* cases dealt with two different kinds of failures to observe the requirements of Section 338 as to service by publication in cancellation proceedings.

[7] The Court of Appeals recognizes the *Volpe* case as a "clear authority" (R. 27) in petitioner's favor. That court also accepts (R. 26) the validity of the whole line of cases, cited in the text, requiring complete compliance with Section 338 for effective cancellation. But that court offers a distinction—in those cases the Government sought to comply with Section 338, whereas here the Government ignored Section 338 altogether. As the Court of Appeals put it, Cook, the naturalization examiner, did not "purport to have acted pursuant to the provisions of" Section 338 (R. 25). If the distinction were valid, we would have two new and unwelcome concepts in our laws: That Federal Government officials are less bound to comply with a Federal statute if they ignore it completely rather than only in part; and that retention of the citizenship of an American is to turn upon whether the Government's pleadings are expressly labelled as filed pursuant to a Federal statute. But the distinction is, in our view, without substance. There would be no reason for the second, third, fifth, and seventh Circuit Courts of Appeal to insist upon scrupulous compliance with Section 338, if an independent jurisdiction to cancel existed.

For the sake of completeness, four additional federal court decisions supporting our position should be noted. *U. S.* v. *Kusche*, 56 F. Supp. 201 (S.D. Cal., 1944), *U. S.* v. *Lenore*, 207 Fed. 865 (D.C. N.Dak., 1913), and *U. S.* v. *Mansour*, 170 Fed. 671 (S.D. N.Y., 1908), aff'd 226 U. S. 604, teach that Section 338 (or its predecessor, Section 15 of the 1906 Act) governs proceedings to cancel citizenship. Jurisdiction to cancel derives from careful compliance with the provisions of that section; and no independent ground of jurisdiction is indicated. And finally there is *U. S.* v. *Ovens*, 13 F. (2d) 376 (C.C.A. 4th, 1926), which held that an unsuccessful motion by the Government to reopen a naturalization proceeding and cancel citizenship is not *res adjudicata* against the Government in a later and independent proceeding to cancel brought pursuant to Section 15 of the 1906 Act, even though the unsuccessful motion was contested and denied on the merits. The necessary rationale of the *Ovens* decision is that the proceeding on the motion to cancel in that case, like the proceeding on the motion to cancel in our case, was void for non-compliance with the statutory provisions governing cancellation of citizenship; for, otherwise, all the requirements of *res adjudicata* were present.

The decisions on the point establish the principle of no jurisdiction to cancel citizenship except in precise compliance with Section 338.

Moreover, that principle, itself, is but one aspect of a broader and well-settled principle of naturalization law—that in naturalization matters statutory procedures must be observed in meticulous detail.

The applicant, in seeking naturalization, and the Government, in seeking cancellation of naturalization, must strictly comply with the statutory provisions enacted by Congress. In naturalization law there are few, if any, permissive bagatelles. Whether it be a matter of conferring naturalization or cancelling naturalization, nothing of the slightest substance in the statute can be disregarded. So the

courts have uniformly held. For the aspect of this principle applicable to cancellation of naturalization, see the *Sotis, Harrington, Volpe, Stabler, Watkins, Kiriaze, Gronich, Lapides, Kusche, Lenore, Mansour,* and *Ovens* cases, all *supra.*

For the aspect of the same principle applicable to the obtaining of naturalization see: *Baumgartner* v. *U. S.*, 322 U.S. 665, 672 (all statutory conditions for naturalization must be satisfied); *U. S.* v. *Ginsberg,* 243 U.S. 472 (statutory provision for naturalization hearing in "open court" requires precisely such a hearing, and naturalization conferred upon a hearing held partially "in chambers" was rightly cancelled in Section 338 proceedings); *U. S.* v. *Vogel,* 262 Fed. 262 (C.C.A. 2nd, 1919) (applicant for citizenship did, in his oath, properly renounce his former allegiance to France. In error as to his former citizenship, applicant, in his declaration and petition renouncing all allegiances generally, had specifically renounced an allegiance to Germany. The Act of 1906 required specific renunciation of former allegiance at all three stages, declaration, petition, and final oath. The naturalization court entered a *nunc pro tunc* order correcting the declaration and petition. On appeal—held void. The lower court had no power to change, or to correct this statutory detail); *Petition of Cohen,* 53 F. (2d) 865 (S.D. N.Y., 1931) (in the absence of specific statutory power to do so, there is no power in naturalization court to correct inadvertent error in naturalization record concerning applicant's birth); see *U. S.* v. *Schwarz,* 82 F. Supp. 933, 936 (S.D. N.Y., 1949).

And see particularly *Maney* v. *United States,* 278 U. S. 17. The Naturalization Act of 1906 set the day of naturalization hearing ninety days after the filing of a petition for naturalization. A similar provision, limited to thirty days, is today contained in Section 334(c) of the successor statute, the Nationality Act of 1940. Such provision protects the Government by allowing time for the investigation of fraud or illegality. This Court held *Maney's* naturalization

bad because his petition was filed seventy and not ninety days before naturalization hearing as the statute required. The Government had lost twenty of the ninety days provided by Congress for its protection. Petitioner, Bindczyck, got none of the sixty days provided by Congress for his protection. What is sauce for the goose is sauce for the gander. *Maney's* naturalization was held bad for failure to comply strictly with a statutory provision allowing ninety days' notice to the Government. Cancellation of petitioner's naturalization was void for complete failure to comply with the statutory provision (Section 338) allowing petitioner sixty days' notice to take counsel and prepare a defense. There is no distinction in reason or in equity between the *Maney* case and our case; and the *Maney* decision by this Court is cogent authority for reversal of the court below.

A state court purported to cancel petitioner's naturalization. But that court, no less than the federal courts, was bound in a naturalization matter to act pursuant to the provisions of the federal statute on naturalization. State courts, acting in naturalization matters, whether pertaining to the grant or cancellation of naturalization, are as strongly bound as the federal courts to observe all statutory provisions, substantive and procedural. For when acting in a naturalization matter, the state court acts purely as a federal agent, and pursuant to the controlling federal statute, now the Nationality Act. *Holmgren* v. *U. S.*, 217 U. S. 509; *Grahl* v. *U. S.*, 261 Fed. 487 (C.C.A. 7th, 1919); *U. S. ex rel. Volpe* v. *Jordan*, 161 F. (2d) 390 (C.C.A. 7th, 1947); see 40 Cong. Rec. 7052. State rules, by statute or case law or judicial practice, on such questions as venue, notice, service, vacation of judgments in the same term, etc., are irrelevant to matters of naturalization. The power to act in such matters can derive only from the federal statute on naturalization. Such is the settled doctrine of the whole body of law on naturalization, the various evidences of which we have set forth in detail in the foregoing discussion.

The Court, in the *Volpe* case, puts the matter most succinctly (161 F. (2d) 390, 395):

> "Thus there can be no doubt but that the entire field of naturalization legislation is within the exclusive domain of Congress and the procedure both for naturalization and denaturalization has been specifically and definitely established. One who seeks the former, just as one who seeks the latter, has the burden of showing strict compliance with the procedure thus established. This must be true in all courts upon whom Congress has conferred jurisdiction, Federal and State alike. As we have shown, a State Court when acting in naturalization matters does so as a Federal court or as an agent of the Federal government. It seems plain that when acting in such capacity it cannot depend upon an iota of authority which may stem from its own rules or the State law, whether embodied in statutory provisions or in the decisions of its courts.
>
> "The fact that the Superior Court had a rule which provided for the vacation of judgments under certain circumstances can have no application to a denaturalization proceeding because the court when acting in such capacity is bound by the procedure adopted by Congress. Neither do we need to inquire as to the authority of a State Court over judgments during the same term at which they were entered. Whatever may be the law as to such judgments generally, it can have no application to a naturalization judgment for the reason that Congress has specifically provided the manner in which such judgments may be revoked or vacated."[8]

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[8] The cancellation of citizenship held void in the *Volpe* case was, like the asserted cancellation of petitioner's citizenship, obtained upon a motion to vacate a judgment of citizenship made in a state court. Observe, however, that in the *Volpe* case, the state court procedure utilized to vacate Volpe's citizenship had been held good by the state courts as being in accordance with state law. *Petition of Volpe*, 328 Ill. App. 311, 66 N.E. (2d) 146. In our case, a motion to vacate filed, served, and heard on notice of less than a day could not have complied with state law. But the point is that there was no compliance with the federal statute, Section 338 of the Nationality Act of 1940. The non-compliance with state law, too, is irrelevant.

Since the Government has not seen fit to petition for certiorari from any of the many decisions against them on the question of the exclusiveness of Section 338, there is no decision of this Court on that precise question. The *Maney* decision in this Court (discussed in detail, *supra* at p. 20) requiring exact compliance with a notice provision on the granting side of naturalization is applicable in reason to a notice provision in Section 338 on the cancelling side of naturalization.

We recall as to cancellation of citizenship that "in its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty". *Schneiderman* v. *U. S.*, 320 U. S. 118, 122. A cancellation suit "is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status". *Schneiderman* v. *U. S.*, just *supra* at p. 160; *Baumgartner* v. *U. S.*, 322 U. S. 665, 675; *U. S.* v. *Jackson*, 55 F. Supp. 517, 520 (E.D. Mich., 1944). For these reasons, this Court firmly interprets Section 338 as requiring the Government to produce "clear, unequivocal, and convincing evidence which does not leave the issue in doubt" before citizenship can be cancelled. *Knauer* v. *U. S.*, 328 U. S. 654, 657; *Schneiderman* v. *U. S.*, 320 U.S. 118, 123, 125; *Baumgartner* v. *U. S.* 322 U. S. 665, 670, 671, 678.

The doctrine of the *Knauer-Schneiderman-Baumgartner* line of decisions rather plainly demands the striking down of the purported cancellation of petitioner's citizenship. The procedure that rushed petitioner to loss of citizenship on hearsay and questionable evidence (R. 11-19) in less than a day, and without the opportunity afforded to petitioner to take counsel and prepare a defense, does not square with the extreme protection of the citizen required by the *Knauer, Schneiderman* and *Baumgartner* cases.

Cf. U. S. v. *Kiriaze*, 172 F. (2d) 1000, 1002 (C.C.A. 5th, 1949).[9]

Neither does the decision below square with the Federal Rules of Civil Procedure. The purported cancellation of petitioner's citizenship was in a state court. But the court below was rightly preoccupied with, and troubled by Rule 81(a)(2) and (6) of the Federal Rules of Civil Procedure (R. 30). The rights of a citizen under a uniform system of naturalization committed to federal power cannot vary according to the forum in which cancellation of naturalization is sought. Yet, reasonably read, Rule 81(a)(2) and (6) requires compliance with the Nationality Act of 1940 in all naturalization matters, both grant and cancellation.

In our system of law based on the rational powers of men, a case which is rightly decided tends, at the very least, to fit in with the law or underlying legal principles surrounding its particular problem. It is significant, as we have seen from the foregoing review of the authorities, that the decision under review here clashes with everything around it.

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[9] We note the scanty support afforded respondents by three dicta. *Petition of Weltzien*, 68 F. Supp. 1000 (S. D. N. Y., 1944) states, but does not decide, that cancellation may be obtained upon a motion to reopen the naturalization judgment and without reference to Section 338. The statement is described, by the judge who made it, as "a perfunctory examination of the matter" (p. 1002); and that perfunctory examination of the matter does not square with controlling authority in its own jurisdiction. See *U. S. ex rel. Stabler* v. *Watkins*, 168 F. (2d) 883 (C.C.A. 2nd, 1948). A statement similar to the *Weltzien* dictum, but somewhat more ambiguous, is contained in *U. S.* v. *Aakervik*, 180 Fed. 137 (D. C. Ore., 1910). Respondents would be the first to urge bad reasoning in the *Aakervik* case which holds Section 15 of the 1906 Act unconstitutional so far as it provides for cancellation of illegally-procured citizenship after the term of court in which such citizenship was procured. *In re Macoluso's Naturalization*, 237 Pa. 132, 85 Atl. 149 (1912), states that Section 15 of the Act of 1906 is not exclusive. The *Macoluso* case, described by the court below as "a leading authority of 28 years standing for the very proposition now in issue" (R. 31), was not concerned with cancellation of citizenship. It dealt only with the delivering up of a forged certificate of citizenship that had never issued out of any court at all. See the *Macoluso* case, 237 Pa. 132, 134; 85 Atl. 149, 150.

None of these dicta for the Government approved of any such lack of safeguarding procedure as resulted in asserted loss of petitioner's citizenship.

B. The Revocation of Petitioner's Citizenship Was Invalid for Want of Due Process.

That the due process clause, whether it be Fifth or Fourteenth Amendment, applies to revocation of citizenship needs no belaboring.[10] Nor need we belabor that due process required reasonable notice to petitioner and a fair opportunity to be heard.[11] Accepting the most restrictive approach to that requirement, namely "an appraisal of the totality of facts,"[12] the question here is—was petitioner on all the facts accorded reasonable notice and opportunity to be heard.

Petitioner is not a lawyer. He works with tools (R. 4). In December, 1943, when his citizenship was revoked, he was a private in our army who had been in the United States for just five years (R. 19; 15; 3). He was away from home, family and friends (R. 3; 5; R. 11-20). Military service restricts freedom of movement. But your petitioner at the time of his revocation "hearing" was under the additional restraint of military arrest (R. 12). As Major Dooley, who testified against him, stated: Petitioner in the week before his "hearing" was "out to one of our sort of little bivouac camps and I haven't been out there" (R. 15). Such was the load upon petitioner on December 9, 1943.

On that day, petitioner was served with notice of hearing to revoke his citizenship (R. 17). On that day, the revocation hearing was held (R. 17). And on that day his citizenship was revoked (R. 19).

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[10] *Schneiderman* v. *U. S.*, 320 U. S. 118; *Baumgartner* v. *U. S.* 322 U. S. 665; *Knauer* v. *U. S.*, 328 U. S. 654; *Johannessen* v. *U. S.*, 225 U. S. 227; *Chin Yow* v. *U. S.*, 208 U. S. 8; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Bridges* v. *Wixon*, 326 U. S. 135; *Wong Yung Sung* v. *McGrath*, 339 U. S. 33; and the cases cited in footnotes 11 and 14, *infra*.

[11] *Garfield* v. *Goldsby*, 211 U. S. 249; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; and the cases cited in footnote 14, *infra*.

[12] See *Betts* v. *Brady*, 316 U. S. 455, 462; *Ashcraft* v. *State of Tennessee*, 322 U. S. 143, 158 (dissenting opinion complaining of abolition of "the totality of facts" rule in a field cognate to the present question).

In the opinion of Congress sixty days notice to a citizen of revocation proceedings is appropriate. So Congress provides in Section 338. Something less might still be reasonable. But as petitioner was situated, the notice of less than a day which he got was not reasonable. It left him no time for his protection. That he was mentally confused is apparent. See R. 15-16, and 19. But there was no time to speak in confidence to someone he could trust —someone he could feel was indubitably on his side, to quiet his excitement and help him to clarify his thoughts and feelings; someone, working for him, to trace down the cause of his confusion and help him rationally to separate it from his oath of allegiance. Observe in this connection that immediately after taking his oath of allegiance petitioner apparently had no reservation as to the truth and sincerity of that oath and his willingness to bear arms for his country (R. 12).[13]

There was not even the opportunity to speak with someone, on his side or otherwise, who might tell him of a right to secure counsel and the advisability of doing so. Prior to the notice of revocation proceedings, petitioner, while under arrest and guard, had the benefit of an interrogation for one hour and a half by the Post Intelligence Officer, Major Dooley, who sought "to gain his confidence" (R. 12; 16). Dooley, who testified against petitioner at the revocation "hearing," did not advise him to seek counsel (R. 12; 16).

There was no opportuity to retain counsel, or even to learn of a right to retain one. With no counsel retained, there was no one to advise delay and preparation, to obtain time, and to utilize the time obtained in preparation for hearing, or indeed in elimination of any need for revocation proceedings. There was no counsel to advise

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13 What intervened between oath and revocation to upset petitioner does not appear of record. The writer believes that what did intervene will provide a successful defense in any fair hearing on revocation. There would otherwise be little point to this protracted litigation. But here we observe the limitations of the record, and, in the text, merely point out what can be inferred from the face of it.

petitioner of the full consequences—loss of wife, child, home and country—if he did himself less than justice in ascertaining the true state of his feelings.

With no opportunity to retain counsel, to take courage, or to prepare himself in any way, petitioner was defenceless at the "hearing." Without objection, a witness was permitted to testify that he saw "grins or smirk" on petitioner's face at the time of his naturalization (R. 14). Petitioner stated in so many words the conclusion that he had sworn falsely in his oath of allegiance (R. 19). With respect to that conclusion on a point where the exact nature and the exact time of petitioner's confused feelings were all-important, there was no one to point out to the court that petitioner's reasons for so concluding did not jibe with the conclusion (See R. 19; and 16). There was no one to emphasize the difference between expression of a desire not to fight and refusal of an order to do so, or to question the relevance of either to revocation. Finally, with the record in that dubious state, there was no one to urge the applicability of the *Schneiderman-Baumgartner-Knauer* rule (See discussion at p. 23, *supra*) on the clear and unequivocal showing that must be made before a citizen can be denaturalized and put beyond the pale.

That is the "totality of facts."

In critical times, due process wears thin. But no critical period, past or present, has ever produced an American judicial utterance which calls what happened here due process.

Plainly enough, petitioner did not receive reasonable notice and the opportunity to be heard. He got an extremely raw deal. The pertinent authorities[14] and every consideration of "essential fairness" (*Adams* v. *U. S. ex rel McCann*, 317 U.S. 269, 279) inherent in the "fundamental principles of liberty and justice" (*Lyons* v. *Oklahoma*, 322 U.S. 596, 601) require the striking down of

[14] *U. S. ex rel. Turner* v. *Fisher*, 222 U. S. 204; *In re Oliver*, 333 U. S. 257; *De Meerleer* v. *Michigan*, 329 U. S. 663; *Hawk* v. *Olson*, 326 U. S. 271.

the revocation of petitioner's citizenship for want of due process.

CONCLUSION.

In our view, there is no substantial doubt as to either the fact of the intent of Congress to make Section 338 exclusive or the fact of the abundant judicial precedents which so interpret the intent of Congress.

If there were such a doubt, the doubt would be resolved in petitioner's favor. Naturalization matters are required by the Constitution to be uniform. The constitutionality of a non-exclusive Section 338 is highly questionable. If the Circuit Court of Frederick County could vary the statutory cancellation procedure in one manner, another court could vary it in another.

Nor need the damage stop there. The obtaining of citizenship and the cancelling of citizenship are the two sides of the one coin. If cancelling procedure can be ignored; so, too, can granting procedure. And thus the uniformity required by the Constitution evaporates.

Indeed, in this aspect of the matter, it is ironic that the very officials of Government who are charged with the enforcement of uniformity in naturalization matters argue here for its stultification.

Finally, if there were any doubt as to the problem here, that doubt should be resolved in petitioner's favor for a strong reason of equity. If the Government loses here, it is not without remedy. Fraud, if there be fraud, can be asserted against petitioner in a Section 338 proceeding at any time the Government sees fit to institute suit. But if petitioner loses here, he has irrevocably lost citizenship, family and home—and in just a few hours.

We respectfully submit that the judgment of the Court below was rather plainly wrong, and should be reversed.

JOSEPH A. FANELLI,
Washington, D. C.

ISIDORE ENGLANDER,
New York, New York,
Counsel for Petitioner.

Washington, D. C.
September, 1951.